Filed 5/30/19 Reiner v. Regents of the University of Cal. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WAYNE R. REINER, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.	G055719 (Super. Ct. No. 30-2016-00869284) O P I N I O N

Appeal from an order of dismissal of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Wayne R. Reiner, in pro. per. for Plaintiff and Appellant.

Clyde & Co US, Margaret M. Holm and Laura L. Stephan for Defendants and Respondents.

* * *

INTRODUCTION

Wayne R. Reiner sued the Regents of the University of California, Dr. Anthony A. Huynh, Dr. Baruch D. Kupperman, Dr. Rafael Migon, and Dr. Stephanie Y. Lu (collectively, defendants) for medical malpractice arising from eye surgery. Reiner

alleged in his complaint that he "could see fine with his glasses" before surgery and that after the surgery "he could not see out of his left eye." The one-year statute of limitations under Code of Civil Procedure section 340.5 began to run when Reiner realized he could not see out of his eye. (All further statutory references are to the Code of Civil Procedure.) His complaint, filed more than six years after that date, was barred by the statute of limitations. The trial court did not err in sustaining defendants' demurrer on that ground. We therefore affirm the order of dismissal in defendants' favor.

STATEMENT OF FACTS[1]

Drs. Kupperman and Huynh diagnosed Reiner with a detached retina and recommended surgery. They advised Reiner that they would put silicon oil in his left eye for the surgery, and he would not be able to see out of that eye. They further advised Reiner the oil would be removed in a subsequent surgery and Reiner's "eyesight would be restored at that time."

On February 18 and March 18, 2009, Reiner underwent eye surgeries at the University of California, Irvine Medical Center, performed by Drs. Kupperman, Huynh, Migon, and Lu. Before his operations, Reiner "was wearing glasses and could see fine with his glasses."

When he arrived for a follow-up appointment on March 26, 2009, Reiner was told Kupperman would not meet with him, and the receptionist refused to schedule another appointment. Reiner's telephone calls to Kupperman and Huynh were never returned. No one disclosed to Reiner that anyone had acted improperly, made a mistake, or done something wrong, or that the treatment Reiner received was below the general medical standard of care.

Reiner, who had been diagnosed with bipolar disorder in 1981, began cycling into a manic phase following his eye surgeries, and was sent by his psychiatrist to

[1] As this appeal is from an order of dismissal following the sustaining of a demurrer, the facts presented here are drawn exclusively from Reiner's complaints.

a care facility in Hawaii. On December 3, 2009, doctors in Hawaii performed surgery on Reiner to remove the silicon oil from his eye. Reiner soon "noticed he could not see out of his left eye." On April 1, 2010, Reiner told his caseworker "he could not see out of his left eye."

Reiner's caseworker in Hawaii submitted a complaint for patient abandonment on Reiner's behalf to the California Medical Board. Kupperman and the University of California, Irvine Medical School Eye Center responded that Reiner had suffered no injury because he was blind both before and after the surgery.

In July 2016, Reiner contacted his former eye care professional to obtain his vision prescription from 2008. This eye care professional told Reiner that he was not blind in 2008, and "had very good vision" with his corrective lenses on.

Reiner sought to obtain his medical records from defendants for more than six years. Reiner did not receive his complete medical records until June 12, 2017.

PROCEDURAL HISTORY

Reiner filed a complaint against defendants on August 15, 2016. Defendants' demurrer to the complaint was sustained with leave to amend. Reiner then filed a first amended complaint, which alleged causes of action for medical malpractice, negligent infliction of emotional distress, fraud, and failure to release patient records. Defendants again demurred. Following briefing and a hearing, the trial court sustained the demurrer to the first three causes of action without leave to amend, and overruled the demurrer as to the fourth cause of action.

Reiner filed a request for dismissal of the fourth cause of action. The trial court entered an order of dismissal of the entire action. Reiner timely filed a notice of appeal.[2]

[2] Reiner does not challenge on appeal the dismissal of the fourth cause of action.

DISCUSSION

We review de novo an order sustaining a demurrer without leave to amend. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1264.) "'"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action.'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

As relevant to this matter, the statute of limitations for medical malpractice provides: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person." (§ 340.5.)

Section 340.5 bars Reiner's claims arising from alleged medical malpractice, including the cause of action for negligent infliction of emotional distress. (*Nava v. Saddleback Memorial Medical Center* (2016) 4 Cal.App.5th 285, 290.) Reiner's first amended complaint alleges that he could see "fine" with his glasses before the surgery. The doctors told Reiner that after the silicon oil was removed from his eye, his eyesight would be restored. When the silicon oil was removed, however, Reiner noticed he could not see out of his left eye, and told this to his caseworker on or about April 1, 2010. The statute of limitations began to run, at the latest, on April 1, 2010 when Reiner

expressed to his caseworker that he could not see out of his left eye, and therefore had discovered the injury. The limitations period expired one year later, April 1, 2011. Reiner's complaint filed in 2016 was not timely.

Reiner argues that the three-year statute of limitations in section 340.5 was tolled due to (1) defendants' fraud upon him, (2) defendants' failure to provide Reiner his full medical records, or (3) his mental illness. A three-year-from-the-date-of-injury statute of limitations would have expired no later than March 18, 2012. Because the one-year-from-discovery statute of limitations expired earlier, we need not address the issue of the tolling.

In any event, the limitations period on Reiner's claims was not tolled. Reiner contends that defendants fraudulently told him he was blind before his surgeries. Assuming the truth of that statement, Reiner cannot establish the element of justifiable reliance. Reiner's complaint alleges that he could see "fine" with glasses before the surgery but could not see out of his left eye after the surgery. Any reliance on defendants' statements that he was blind before the surgery would not be justified. (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 ["whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts"]; see *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [quoting *Guido v. Koopman*].)[3]

With respect to the failure to provide Reiner with a complete copy of his medical records, the failure to disclose evidence, as opposed to the failure to disclose facts, does not constitute intentional concealment for purposes of section 340.5. (See *Mark K. v. Roman Catholic Archbishop* (1998) 67 Cal.App.4th 603, 613.)

---

[3] Reiner's lack of justifiable reliance also dooms his claim for fraud against defendants. (§ 338, subd. (d) [fraud claims subject to three-year statute of limitations]; *West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 794 [fraud claim requires showing of justifiable reliance on the alleged misrepresentation].)

Finally, Reiner's mental illness does not toll the statute of limitations. "'There is no evidence of a legislative intent in the instant situation to allow exceptions [to the three-year period] other than those listed in section 340.5. All indications of intent are to the contrary. The legislative enumeration of certain exceptions by necessary implication excludes all other exceptions. [Citation.] Furthermore, the Legislature prefaced the list of instances in which the statute is tolled with the proviso that "in no event" shall the statute be tolled in other instances. Although the statute then goes on to set forth a [separate] calculation of the time period for minors, there is no separate calculation for incompetents [or prisoners] and no indication that the Legislature intended section 352 to act as a residuary for classes not mentioned in section 340.5.'" (*Rewald v. San Pedro Peninsula Hospital* (1994) 27 Cal.App.4th 480, 486-487, italics omitted.)

DISPOSITION

The judgment is affirmed. In the interests of justice, each party shall bear its own costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.